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TO THE HOUSE COMMERCE COMMITTEE

REGARDING SUBSTITUTE FOR HB 5002

On October 18, 2011, a substitute bill for HB 5002 was introduced. While it is an improvement over the prior bill, it still has some provisions that are unfair to injured workers, and will result in a significant shift of costs from workers' compensation insurance carriers and self-insureds to the State of Michigan welfare budget. This letter discusses the most important section of the bill, dealing with the definition of disability, Section 301. Like the previous bill, the bill allows employers to deduct the employee's theoretical wage earning capacity from the wage loss owed to partially disabled workers. In order to understand the significance of this change, let me first briefly explain the history of the definition of disability in the Workers' Disability Compensation Act.

A Brief History of the definition of disability

From 1912 to 1982, there was no statutory definition of disability. In 1982, the Legislature enacted Section 301(4), which provided :

...'disability' means a limitation of an employee's wage earning capacity in the *employee's general field of employment* resulting from a personal injury or work-related disease.

The courts deemed this definition as no change from the prior Act, which defined disability as an inability to do ANY of the employee's prior jobs. Dissatisfaction with interpretation of this definition led the Legislature to amend the definition of disability in 1987:

'disability' means a limitation of an employee's wage earning capacity in *work suitable to his or her qualifications and training* resulting from a personal injury or work related disease.

Judicial interpretation of this 1987 language continues to evolve 24 years later. In 2002, the Supreme Court decided *Sington v Chrysler Corp.*, 467 Mich 144 (2002). In that case, the Supreme Court held that in order to prove disability, the injured worker had to prove that he or she "is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications. (*Ibid.*, at 467 Mich 157) Despite the lack of any language in the statute talking about "maximum wages," the Supreme Court required the injured worker to prove that he/she was unable to work in any jobs which allowed the worker to earn his/her

"maximum wages." If the worker proved that the disability prevented the worker from earning "maximum wages" at his/her current job or any prior jobs, then the worker received wage loss benefits, approximately 80% of their average after-tax weekly wage at the time of the injury.

Six years later, the Supreme Court further increased the burden of proof on injured workers when it decided *Stokes v DaimlerChrysler Corp.,* 481 Mich 266 (2008). In *Stokes,* the Supreme Court added additional elements of proof that have resulted in a new requirement of discovery of work histories and both sides having to hire vocational experts to determine the 4 elements of disability announced in *Stokes:*

"(1) The claimant must disclose all of his qualifications and training;

(2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;

(3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and

(4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying *MCL 418.301(4)*, and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden."

Stokes, at 481 Mich 297-8.

It should be noted that the substitute bill seeks to statutorily enshrine the Stokes case holding in the statute. As a result of Stokes, in every wage loss case both sides must now hire vocational experts to meet or dispute the vocational proofs now required. This has resulted in doubling the costs of experts for both sides in litigated cases and a greatly expanded burden in fact-finding by magistrates. In the old days, litigants only had to provide expert medical testimony. Now both sides need expert vocational testimony.

If that wasn't bad enough, the current bill seeks to make even more important changes than those decided in *Stokes.*

Comparison of Stokes to Substitute HB 5002

Substitute HB 5002 does not simply codify *Stokes,* it goes further by changing how wage loss benefits are calculated by deducting the theoretical residual wage earning capacity from the wage loss rate. The bill's definition of partial disability in Section 301(4) provides, in part:

A DISABILITY IS PARTIAL IF THE EMPLOYEE RETAINS A WAGE EARNING CAPACITY AT A PAY LEVEL LESS THAN HIS OR HER MAXIMUM WAGES IN WORK SUITABLE TO HIS OR HER QUALIFICATIONS AND TRAINING.

In Section 301(5), the bill sets forth the 4 elements of disability required by *Stokes*. If there are other jobs that the injured employee can perform that allow maximum wages, the employee cannot collect wage loss benefits unless he or she shows that they cannot obtain those jobs, using a good faith effort to do so. However, the substitute bill changes how partially disabled workers are paid wage loss benefits. Instead of paying 80% of their average after-tax pay, Section 301(8), allows the employer to only pay 80% of the difference between the employee's average after-tax weekly wage before the injury and the employee's residual wage earning capacity:

"IF A PERSONAL INJURY ARISING OUT OF THE COURSE OF EMPLOYMENT CAUSES PARTIAL DISABILITY AND WAGE LOSS AND THE EMPLOYEE IS ENTITLED TO WAGE LOSS BENEFITS, THE EMPLOYER SHALL PAY OR CAUSE TO BE PAID TO THE INJURED EMPLOYEE AS PROVIDED IN THIS SECTION WEEKLY COMPENSATION EQUAL TO 80% OF THE DIFFERENCE BETWEEN THE INJURED EMPLOYEE'S AFTER-TAX AVERAGE WEEKLY WAGE BEFORE THE PERSONAL INJURY AND THE EMPLOYEE'S WAGE EARNING CAPACITY AFTER THE PERSONAL INJURY,..." (Emphasis added)

This means the employer does not have to pay the 80% wage loss rate provided in the current Act, but only pays 80% of the difference between the employee's average weekly wage and the employee's theoretical residual wage earning capacity after the injury. The cruelty of this provision is evident upon considering a simple example: **Take an employee who is earning $12.00/hour, or $480/week before taxes.** That's a modest income of about $25,000/year. If she's single with no dependents, **the current wage loss rate table gives her a wage loss rate of $301.54.** That's how much she'd get under our current system.

However, the substitute bill dramatically changes the calculation of wage loss rates. The current wage loss rate tables represent 80% of the employee's after-tax pay, so to convert this to the "after-tax average weekly wage" required by Section 301(8), we increase her wage loss rate of $301.54 by 20% to $376.93. If the employer determines that she's still capable of working a minimum wage sit-down job as a security guard, then she would have a theoretical wage earning capacity of $320/week, assuming $8.00/hr times 40 hours. Since security guard jobs are considered unskilled and requires very little training, almost every injured worker would have the residual wage earning capacity to perform the job, whether or not they had every performed it. So in our example, $376.93-320.00= $56.93 X .80= $45.44. **So the injured worker, instead of getting $301.54/week, gets $45.44/week in wage loss benefits.** Section 301(12) of the bill also adds a new

requirement that injured workers must seek reasonable employment, or their wage loss benefits will be reduced.

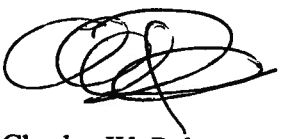
Paying the full 80% wage loss to partially disabled employees creates incentives for employers to return the person to their former employment. However, if the employer does not have to pay the full wage loss, any financial incentive to bring the employee back to work is lost. If our injured worker above is unable to find a job to pay her residual wage earning capacity, she will end up on welfare or homeless. Given our state's high unemployment rate, it is unrealistic to think that injured workers will be able to quickly go out and find a new job. Furthermore, by requiring partially disabled workers to look for work in order to be eligible for wage loss, the worker is not being given any time to simply heal from her injuries. Under this bill, an injured worker with a residual earning capacity must immediately look for other work even while treating with doctors for her injuries, and there is no requirement that the employer has to take her back.

This represents a huge change in the workers' compensation system. For 100 years, employers had the power to reduce or eliminate their obligation to pay wage loss benefits by offering the injured employee work within their medical restrictions. Substitute HB 5002 destroys any incentive for employers to bring injured employees back to work because their wage loss obligation will be negligible and they can hope that someone else hires the injured worker. If enacted, substitute HB 5002 will be a huge cost shift from employers and their insurance carriers to the tax-paying public. Michigan's welfare system does not need any more strain on the limited resources available in the state's budget.

I have only discussed the substitute bill's definition of disability in this letter. The bill also expands the employer's control of the medical provider from 10 days to 45 days. The substitute bill still contains a provision that will force police and fire employees with early full pension rights to take those pensions when injured. The substitute bill eliminates screening of magistrates by the Qualifications Advisory Committee and would further politicize an already overly politicized system of magistrate appointments. Litigated workers' compensation cases are complicated from both a medical and vocational standpoint. Scrapping the requirements that ensured qualified candidates for appointment by the governor is not good public policy.

Insurance rates for workers' compensation insurance are dropping. There is no economic justification for the draconian aspects of this bill. The effects of this substitute bill will cause injured workers without sufficient wage loss benefits to lose their homes, their apartments, and increase caseloads in the welfare system. The negative effect on our state's economy, when injured workers don't have money to pay their rent, support their children, and even put food on their table, would be catastrophic. In the interests of fairness to injured workers, and in the interests of protecting our state welfare system from further expansion, I urge you to make appropriate changes in the substitute bill.

Respectfully submitted,



Charles W. Palmer
Attorney at Law

Attachment- Substitute for HB 5002- Section by section analysis of how it will change current law.

Substitute for HB-5002: Section by section analysis of how it will change current law

Section 210: Appointment of qualified applicants for magistrate

Eliminates the Qualifications Advisory Committee, which currently administers a test and screens potential appointees to the Board of Magistrates and the Workers' Compensation Appellate Commission. Instead only requires an attorney in good standing who has been licensed for 5 years.

Section 212: Evaluating performance of magistrates

Eliminates reference to the Qualifications Advisory Committee and places responsibility for evaluation with the Workers' Compensation Agency. Eliminates current maximum service of 12 years as a magistrate.

Section 274: Workers Compensation Appellate Commission

Eliminates screening of potential Workers' Compensation Appellate Commission appointees by the Qualifications Advisory Committee. Eliminates current maximum term of 12 years for commissioners.

Section 301(1): Definition of disability

Personal injury is only compensable if the work injury causes or aggravates a medical condition in a way that is "medically distinguishable" from the employee's prior condition. Creates a higher standard of medical proof for aggravation cases than the Supreme Court's decision in *Rakestraw v General Dynamics,* 469 Mich 220 (2003.)

Section 301(2):

Adds degenerative arthritis to list of conditions that are only compensable if contributed to or aggravated or accelerated by the employment in a significant manner.

For mental disabilities, adds the requirement that the employee's perception of actual events is reasonably grounded in reality.

Section 301(4):

(A) The current section defines disability as a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training." The Michigan Supreme Court in *Stokes v DaimlerChrysler* interpreted this section as defining disability as an inability to do any jobs "available" to an employee that pays the "maximum wages" earned in a previous job. The bill defines total disability as an inability to do any job paying maximum wages suitable to their qualifications and

training. The bill defines partial disability as the worker having a residual wage earning capacity to earn less than his or her maximum wages.

(B) Wage earning capacity" is defined as the wages an employee is capable of earning at a job reasonably available to the employee, whether or not the employee has ever earned wage at such a job.

(C) Wage loss is established by proof that the employee is making an effort to procure work suitable to his or her residual wage earning capacity. Would require injured workers to look for work even when recovering from an injury because wage loss benefits would not be available unless the employee is looking for work.

(5) Adds section setting forth 4 requirements to establish a right to wage loss benefits:

(A) Provide information to the employer of the worker's qualifications, training, education, skills, and experience.

(B) Requires the injured worker to provide evidence as to any jobs he or she is qualified to perform within the same salary range as his or her maximum wages. This would require every injured worker to hire a vocational expert to prove this factor.

(C) Requires the injured worker to prove that he or she is unable to perform some or all jobs that would pay the worker "maximum wages." This would require the injured worker to prove not only the medical aspects of disability, but also the vocational elements identified in (B).

(D) If the worker is capable of performing any jobs that would earn maximum wages, then the worker must prove that he or she cannot obtain any of those jobs. The worker must make a good faith attempt to procure post-injury employment if there are jobs that would earn maximum wages. Remember that in Section 301(4)(B), wage earning capacity is not only past jobs performed by the worker, but also all other jobs the employee is theoretically capable or earning.

(6) If the claimant establishes the 4 elements above, the burden of proof shifts to the employer to refute the claim. The employer would have "a right to discovery, if necessary." By not limiting discovery to the information required in Section 301(5)(A), this would entitle the employer to complete pre-trial discovery, including interrogatories, requests to produce, and discovery depositions. Currently only the information required to be produced by the worker is the Agency Form 105A, Work History form.

(7) If the employee proves total disability, the employee receives 80% of the employee's after-tax earnings, the same as under current law.

(8) If the employee proves partial disability, the employee receives 80% of the difference between the weekly wages before the injury and the employee's post-

injury residual wage earning capacity. This provision would allow employers to deduct the employee's theoretical residual wage earning capacity from the wage loss owed, drastically reducing or eliminating cash benefits for most injured workers.

(9)(a) Adds termination from post-injury employment due to the fault of the employee as grounds for terminating partial disability wage loss payments. This provision would create economic incentives for employers who bring an injured worker back to work at less pay to terminate employees for "fault," which is undefined in the bill.

(9)(d)(i) Under current law, if an employee returns to work or a different job after an injury and is making less money, they receive partial disability benefits based the difference in pre-and post- injury wages. The bill modifies the current automatic reinstatement of wage loss benefits if the job is lost within 100 weeks after return to work, by eliminating wage loss benefits if the employee was at fault for the termination of employment.

(9)(d)(ii) Under current law, whether an employee has re-established a new wage earning capacity after 100 weeks of returning to work is a question of fact. The bill requires hearing by a Magistrate for employees who lose their job between 100-250 weeks on the job after an injury to determine whether the work done established a new wage earning capacity. If no hearing, there is a presumption that the employee has established a new wage earning capacity. The bill also requires injured workers seeking resumption of wage loss payments to first exhaust any unemployment benefits before seeking workers' compensation.

9(d)(iii) Changes the current rebuttable presumption of new wage earning capacity after 250 weeks of employment after an injury to a conclusive presumption. Employees who work for 250 weeks after an injury lose all rights to any continuing wage loss, regardless of whether the post-injury job actually created new skills.

(12) Creates a new requirement that injured employees have an affirmative duty to look for work, and any worker who fails to do so will have his or her wage loss benefits reduced. Bill does not allow injured worker any injury recovery time before imposing the duty to look for other work. Therefore, benefits could be denied to injured workers who are not looking for work while recovering from an injury.

Section 315 Medical care

(1)Gives employers total control of an injured employee's health care provider for the first 45 days, as opposed to the first 10 days in the current statute. If the employee needed surgery in the first 45 days, the employer could force employee to use surgeon of employer's choice. By controlling the choice of medical provider, the employer also has greater control over return to work timelines and medical restrictions when the employer-controlled doctor returns the employee to work.

Bill also changes existing law that gives the Magistrate discretion to order attorneys fees on unpaid medical bills to be paid by the employer or insurance carrier. Change prohibits magistrates from charging any attorneys fees on unpaid medical bills to the employer or insurance carrier. Since the employer or insurance carrier are responsible for the non-payment of medical bills, the bill removes the financial incentive for employers or carriers to pay medical bills in a timely fashion and without the necessity of litigation.

Section 319- Vocational Rehabilitation

Currently any disputes regarding vocational rehabilitation are first decided by the Director of the Agency, with appeal to a Magistrate. Bill eliminates Magistrate appeal, and allows appeal directly to the Appellate Commission. Appeal time is reduced from 30 days to 15 days from the Director's order.

Section 331- Dependency

Eliminates language that provide that a wife was conclusively presumed to be a total dependent of the husband, language was that ruled unconstitutional by the Michigan Supreme Court. Instead of making spouses presumed dependents, which would pass constitutional challenge, the bill simply eliminates the prior language.

Keeps language in the current section that provides that children under age 16 are presumed to be total dependents, despite the fact that the age of majority in Michigan is 18 years.

Section 354- Coordination with other benefits

Adds provision(1)(d), which allows the employer to coordinate any regular pension that the employee is "eligible to receive at normal retirement age" whether or not the employee is actually receiving the pension. The bill does not define "normal retirement age." For UAW members, or police and fire employees, who may be eligible for a pension after 25 or 30 years and choose to continue working, this provision would force the employee to take the pension when they are injured because the employer gets credit against the workers' comp wage loss owed for a pension that is not actually being received, and the resulting financial hardship would force the employee to take the pension.

Section 360- Professional athletes

Michigan law currently has jurisdiction over all work injuries that occur in the state. The bill exempts athletes employed by out-of-state employers from coverage for injuries in Michigan if the employer has insurance coverage from another state. Would allow professional sports organizations to get coverage in other states with lower benefits and rates.

Section 361- Specific losses

(2) A recent Michigan Supreme Court case allows a specific number of weeks of wage loss benefits for amputation of part of the leg for a knee replacement, which then mandates a minimum period of wage loss benefits without regard to whether the injured worker returns to work or not. Bill allows consideration of the effects of joint replacement surgery, implant, or other medical procedure in determining whether there has been a "loss" of a specific body part, such as hand, finger, leg, etc.

Section 381- Claim for Compensation

Allows filings to be made electronically.

Section 401- Occupational diseases

Makes the same changes to the definitions of disability as found in Section 301.

Section 625- Insurance contracts subject to act

Allows electronic filing.

Section 801- Interest on wage loss awards

(6) Changes interest rate from the current 10% annual rate, to the civil money judgment interest rate used in Michigan courts, which is 1% added to the rate of 5 year U.S. Treasury notes, calculated every 6 months.

(7) Requires the Workers' Compensation Agency to implement a system by April 1, 2012 for detection and prevention of fraud, waste, and abuse.

Section 835- Redemption of liability from personal injury

Allows electronic filing.

Section 836- Approval of redemption agreement

Current law requires a Magistrate to approve all permanent settlement of future claims, called redemptions. The bill would allow the employer and employee to agree to waive the redemption hearing. In cases where the employee is unrepresented by an attorney, could create conditions allowing an employer to obtain an unfair settlement without having the oversight of a Magistrate hearing.

Section 837- Approval or rejection of redemption agreements

Repeats the same waiver provision discussed in Section 837 above.

Section 847- Setting case for mediation or hearing

Allows electronic filing.

Section 853- Process and procedure

The bill allows attorneys of record in a contested case to sign subpoenas. Curiously, the bill also allows "the clerk of the court in which the matter is pending" to sign subpoenas, but there are no "clerks of the court" in the Board of Magistrates.

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